

## Decision of the European Ombudsman on complaint 2352/2004/TN against the European Commission

Decision

**Case 2352/2004/TN - Opened on 10/09/2004 - Decision on 17/11/2005**

Strasbourg, 17 November 2005

Dear Mr G.,

On 26 July 2004, you made a complaint to the European Ombudsman concerning the European Commission's reply to your letter of 23 February 2004 regarding family benefits for cross-border workers.

On 10 September 2004, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 16 November 2004 and I forwarded it to you with an invitation to make observations, if you so wished, by 31 January 2005 at the latest. No observations were received from you by that date.

In an e-mail sent on 5 April 2005, you asked about the progress of your case. My services replied by e-mail of 8 April 2005, explaining that the material submitted so far was being analysed to determine whether further information was needed in order to make a decision.

On 9 June 2005, I wrote to the Commission, asking for further information in relation to the complaint. The Commission sent its reply on 10 August 2005 and I forwarded it to you with an invitation to make observations, if you so wished, by 31 October 2005 at the latest.

By e-mail of 14 October 2005, you asked for an indication as to when you could expect a decision on your case. In reply of 17 October 2005, my services recalled having forwarded to you the Commission's reply to my request for further information, inviting you to make observations by the end of October 2005. My services asked you to clarify whether your e-mail of 14 October 2005 meant that you did not wish to make any observations, in which case your complaint would be analysed on the basis of the information already provided by you and the Commission. By e-mail of 17 October 2005, you informed my services that you did not wish to make any observations.

I am writing now to let you know the results of the inquiries that have been made.



## THE COMPLAINT

According to the complainant, the relevant facts are, in summary, as follows:

The complainant and his family live in Ireland but he works in Northern Ireland, that is to say, in the UK. Until April 2003, he received child benefit from the UK authorities and an additional "top up" sum from Ireland since child benefit is higher in Ireland than in the UK. This was done in accordance with Regulation 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (1) , which provides that when entitlement to family benefits exists under the legislation of several Member States, the person concerned will receive the highest amount of benefit which is provided for under the legislation of one of these Member States.

In April 2003, he was notified that he was going to receive a child tax credit from the UK to replace the working families tax credit that he had received up to then. As a consequence, he lost the right to the "top up" sum from Ireland, since the UK child tax credit had the characteristics of a family benefit. However, he is of the opinion that, with the UK child tax credit, he receives less in benefits than he would receive if he were entitled to child benefit from Ireland alone.

It can be noted from the documents attached to the complaint that the complainant wrote to the Commission regarding the matter on 23 February 2004. The Commission replied on 6 April 2004. However, the complainant considered that the Commission had misunderstood his position as being that the UK child tax credit is not a family benefit and that this cannot be added to the UK child benefit when calculating the total amount of UK family benefits. The complainant therefore turned to the Commission again on 26 April 2004. The Commission replied on 26 May 2004, merely referring to its reply of 6 April 2004. According to the complainant, the Commission failed to address, in its two letters, the grounds on which he appealed against the decision that he was no longer entitled to receive the "top up" sum of Irish child benefits.

The complainant alleged that the Commission's reply failed to deal with the fact that, under the new system of UK child tax credit, he does not receive what he is entitled to under Regulation 1408/71, namely the highest amount of benefit provided for under the legislation of one of several Member States in which an employed person is entitled to receive family benefits.

The complainant claimed that the Commission should ensure that he receives the correct amount of child benefit.

## THE INQUIRY

### **The Commission's opinion**

In its opinion of 16 November 2004, the Commission makes, in summary, the following comments:



The complainant wrote to the Commission on 23 February 2004, enclosing a copy of a letter from the Irish Child Benefit Office and a copy of his reply. The documents were analysed by the Commission, which informed the complainant, by letter of 6 April 2004, that the Irish Child Benefit Office's decision was not contrary to Community law. In his reply to the Commission's letter, the complainant advanced four grounds for appeal, arguing that he should obtain child benefits both from the UK and from Ireland. The Commission analysed these grounds, concluding that the complainant had not put forward any new elements which would require it to change its position. The Commission therefore reiterated its position in a letter to the complainant of 26 May 2004. In a letter of 24 May 2004, the complainant asked the Commission to reinstate his child benefit from April 2003. In the reply of 8 July 2004, the Commission again confirmed its position that the Irish decision is in conformity with Community law. The complainant was advised to make use of the possibilities available under national law to appeal against the decision.

The Commission considers that the complaint to the Ombudsman, in which the complainant argues that the Commission did not address his grounds for appeal against the Irish Child Benefit Office's decision and his claim that the Commission should ensure that he receives the correct amount of child benefit, does not concern the way in which the Commission has dealt with the complainant's letter but rather the content of the Commission's replies. The complaint is therefore legally unfounded.

However, the Commission confirms its analysis of the complainant's case. Regulation 1408/71 contains special provisions for family members not living in the Member State under the legislation of which an employed or self-employed person is insured. If, in such a case, the entitlement to family benefits exists under the legislation of several Member States, the person concerned will receive, as a rule, the highest amount of benefit which is provided under the legislation of any of these Member States. In other words, the family members concerned are treated as if they all reside and are insured in the Member State with the most favourable legislation, which in this case is the UK. The Irish Child Benefit Office can, therefore, in accordance with Article 73 of Regulation 1408/71 and Article 10 of Regulation 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (2), suspend the payment of Irish family benefits.

Although the UK child tax credit cannot be considered as a family benefit and therefore does not fall under Article 4(1)(h) of Regulation 1408/71, the Commission considers that the child tax credit scheme is to be regarded as a social security benefit for the purposes of Regulation 1408/71. Despite being income related, the child tax credit is granted without any individual or discretionary assessment of personal needs on the basis of a legally defined position (Case C-275/96 *Kuusijärvi* (3)).

The Commission also underlines that the complaint concerns social security matters and that the Community provisions in this field, namely Regulation 1408/71 and Regulation 574/72, only provide for the coordination of national social security schemes. The main consequence of coordination is that the Community provisions determine which national legislation should be



applicable in each case, but that they cannot define the content of national social security legislation.

#### **The complainant's observations**

The Ombudsman invited the complainant to submit observations on the Commission's opinion. No observations were submitted by the complainant.

#### **Further inquiries**

After careful consideration of the complaint and the Commission's opinion, it appeared that further inquiries were necessary.

On the basis of the information provided, which included copies of the correspondence between the parties, the Ombudsman found that the complainant's concern, namely that he does not receive the higher amount of benefit provided for under the legislation of either Ireland or the UK, appeared to be based on his "earning less" following the introduction of the UK child tax credit and that he therefore does not understand how the Commission could consider that the UK legislation in question is the more favourable. It therefore seemed useful to ask the Commission to *explain why it considers that UK legislation is the more favourable for the complainant under Regulation 1408/71*.

In the light of the Commission's conclusion that the Irish Child Benefit Office, applying Regulation 1408/71 and Regulation 574/72, is entitled to take into account the UK child tax credit, when deciding whether to suspend its payment of Irish child benefits, the Ombudsman also asked the Commission to *explain the statement, made in its opinion, that the UK child tax credit cannot be considered as a family benefit and, therefore, does not fall under Article 4(1)(h) of Regulation 1408/71*.

The Commission's reply

In its reply of 10 August 2005, the Commission makes, in summary, the following comments:

Article 13(2)(a) of Regulation 1408/71 stipulates that an employed person is subject to the legislation of the Member State in which he is employed. As the complainant is working in the UK, he is subject to the UK social security scheme, including family benefits. When family members do not live in the Member State under the legislation of which the employed person is insured, and, moreover, entitlement to family benefits exists under the legislation of two or more Member States, Regulation 1408/71 determines that the legislation of the Member State of employment prevails. However, when the amount of family benefits is higher in the Member State in which family members reside than in the Member State of employment, the former state shall pay the difference between the amount of family benefits granted by the two Member States.

As regards the complainant's situation, it is clear from the documents provided by him that he is entitled, under UK legislation, to family benefits to the amount of EUR 1 686.82 per month for a family of seven children. This figure is composed of child benefits and child tax credit. Since the child benefit rate in Ireland for seven children is EUR 1 037.70, the UK legislation is more favourable to the complainant. Therefore, the Irish Child Benefit Office did not act contrary to Community law when suspending the payment of Irish family benefits to the complainant. In these circumstances, the Irish authorities are not required to pay any "top-up" sum.



As regards the Ombudsman's second question concerning the Commission's statement, in its opinion of 16 November 2004, that the UK child tax credit cannot be considered as a family benefit and, therefore does not fall under Article 4(1)(h) of Regulation 1408/71, unfortunately a typing error had slipped into its opinion. The statement in the Commission's letter of 16 November 2004 to the complainant is: *"In your opinion the UK Child Tax Credit can not be considered as a family benefit and therefore, do not fall under Article 4(1)(h) of Regulation 1408/71. The Commission services, however, consider that the Child Tax Credit scheme is to be regarded as social security benefit for the purposes of Regulation 1408/71. Although it is income related, Child tax credit is granted without any individual and discretionary assessment of personal needs on the basis of a legally defined position (judgement of 11.03.1998 of the Court of Justice, Case C-278/91, Kuusjärvi)."*

In its reply to the Ombudsman's further inquiries, the Commission confirms, therefore, that it does consider the UK child tax credit to be a family benefit falling under Article 4(1)(h) of Regulation 1408/71 and it apologises for any confusion caused.

The Ombudsman invited the complainant to submit observations on the Commission's opinion. The complainant informed the Ombudsman's services that he did not wish to make any observations.

## THE DECISION

### 1 Introductory remark

1.1 The Ombudsman notes that, in its opinion, the Commission argues that the complaint does not concern the way in which the Commission has dealt with the complainant's letter, but rather the content of the Commission's replies. The Commission therefore considers the complaint to be legally unfounded.

1.2 The Ombudsman understands the Commission's remark as wanting to distinguish between procedural and substantial aspects of its reply to the complainant. The Ombudsman recalls, however, that he can examine both these aspects of a reply and find maladministration both where letters are not answered within a reasonable period of time and where the reply is wrong. The Ombudsman does not consider, therefore, that the fact that a complaint concerns the content of a reply automatically makes it legally unfounded. The question of whether the complaint is founded in this regard, that is, whether the Commission has replied to the complainant in accordance with the applicable rules and principles, is decided upon by the Ombudsman *following his inquiry*.

### 2 The alleged failure to deal with the complainant's concern

2.1 The complaint concerns the European Commission's reply to the complainant's letter of 23 February 2004 regarding family benefits for cross-border workers. The complainant and his family live in Ireland but he works in Northern Ireland, that is, in the UK. Until April 2003, he received child benefits from the UK and an additional "top up" sum from Ireland since the child benefit allowance was higher in Ireland than in the UK. This was done in accordance with Regulation 1408/71 (4), which provides that when entitlement to family benefits exists under



the legislation of several Member States, the person concerned will receive the highest amount of benefit which is provided for under the legislation of one of these Member States. In April 2003, he was notified that he was going to receive a child tax credit from the UK to replace the working families tax credit that he had received up to then. As a consequence, he lost the right to the "top up" sum from Ireland, since the UK child tax credit had the characteristics of a family benefit. However, he is of the opinion that, with the UK child tax credit, he receives less in benefits than if he were entitled to receive child benefit from Ireland alone.

2.2 According to the complainant, he wrote to the Commission regarding the matter on 23 February 2004. The Commission's reply of 6 April 2004 failed to address the grounds on which he appealed against the decision by the Child Benefits Office that he was no longer entitled to receive the "top up" sum from Ireland. The complainant alleges that the Commission's reply failed to deal with the fact that, under the new system of UK child tax credit, he does not receive what he is entitled to under Regulation 1408/71, namely the highest amount of benefit provided for under the legislation of one of several Member States in which an employed person is entitled to receive family benefits.

2.3 In its opinion, the Commission acknowledges that the complainant wrote to it on 23 February 2004, enclosing a copy of a letter from the Irish Child Benefit Office as well as a copy of his reply. The documents were analysed by the Commission, which informed the complainant, by letter of 6 April 2004, that the Irish Child Benefit Office's decision was not contrary to Community law. In reply, the complainant advanced four grounds for appeal, arguing that he should obtain child benefit both from the UK and from Ireland. The Commission analysed these grounds, concluding that the complainant had not put forward any new elements which would require it to change its position. The Commission therefore reiterated its position in a letter to the complainant of 26 May 2004. In a letter of 24 May 2004, the complainant asked the Commission to reinstate his child benefit from April 2003. In its reply of 8 July 2004, the Commission again confirmed its position that the Irish decision was in conformity with Community law.

2.4 In its opinion, the Commission furthermore confirms its earlier analysis of the complainant's case. Regulation 1408/71 contains special provisions for family members not living in the Member State under the legislation of which an employed or self-employed person is insured. If, in such a case, the entitlement to family benefits exists under the legislation of several Member States, the person concerned will receive, as a rule, the highest amount of benefit which is provided under the legislation of any of these Member States. In other words, the family members concerned are treated as if they all reside and are insured in the Member State with the most favourable legislation, which in this case is the UK. The Irish Child Benefit Office can, therefore, in accordance with Article 73 of Regulation 1408/71 and Article 10 of Regulation 574/72, suspend the payment of Irish family benefits.

2.5 The Ombudsman notes that the Commission's reply of 6 April 2004 to the complainant's letter of 23 February 2004 contained the same information as in its opinion to the Ombudsman (point 2.4 above). The Ombudsman further notes that, in its letter to the complainant, the Commission explained that the social security systems of the Member States are not



harmonised and that, in the complainant's case, the UK has the more favourable legislation since the UK child tax credit scheme is to be regarded as a social security benefit for the purposes of Regulation 1408/71. The Commission therefore concluded that the Irish Child Benefit Office's decision to suspend the payment of Irish child benefits appeared not to be contrary to Community law, since the Irish child benefit is less than the amount of UK family benefits and the child tax credit.

2.6 Since the complainant did not appear to understand how the Commission could consider that the UK system of family benefits is the more favourable system, the Ombudsman asked the Commission for a further explanation in that regard. In reply, the Commission explained that, as regards the complainant's situation, it is clear from the documents provided by him that, under UK legislation, he is entitled to receive family benefits to the amount of EUR 1 686.82 per month for seven children (consisting of child benefits and child tax credit). Since the child benefit rate in Ireland for seven children is EUR 1 037.70, the UK legislation is more favourable to the complainant. Therefore, the Irish Child Benefit Office did not act contrary to Community law when suspending the payment of the Irish family benefit to the complainant. In these circumstances, the Irish authorities are not required to pay any "top-up" sum.

2.7 The Ombudsman recalls that, as pointed out by the Commission, the rules governing national social security systems have not been harmonised and these systems therefore function in different ways. The Member States are free to determine what social benefits they wish to bestow and how. Community provisions in the field of social security only provide for the coordination of national social security schemes, that is, the Community provisions determine which national legislation should be applicable in each case. The Ombudsman notes that it appears to be undisputed between the parties that Community law provides that, if entitlement to family benefits exists under the legislation of several Member States, the person concerned will receive, as a rule, the highest amount of benefit which is provided under the legislation of any of these Member States. The Ombudsman further notes that, during the course of the present inquiry, the Commission provided detailed figures showing the amounts of family benefits that the complainant is entitled to receive in the UK and Ireland respectively. These figures, which the complainant does not appear to dispute, show that the amount of family benefits that the complainant is entitled to receive in the UK is higher than his entitlements under the Irish system. Nevertheless, the Ombudsman notes the complainant's concern that, following the introduction of the UK child tax credit, he is "earning less". The Ombudsman would like to point out, however, that earning less is not the same as receiving less in benefits. In view of the above, and of the fact that the complainant does not appear to question the Commission's view that the UK child tax credit is a social security benefit for the purposes of Regulation 1408/71, the Ombudsman considers that the Commission provided a coherent and reasonable account of the complainant's situation under Community law in reply to his letter of 23 February 2004. The Ombudsman therefore finds no maladministration by the Commission in this regard.

### **3 The complainant's claim**

3.1 The complainant claims that the Commission should ensure that he receives the correct amount of child benefit.

3.2 On the basis of the findings in point 2.7 above, the Ombudsman has found no evidence to



suggest that the complainant does not receive the correct amount of child benefit under Community law. The complainant's claim must therefore fail.

#### **4 Conclusion**

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the Commission. The Ombudsman therefore closes the case.

The President of the Commission will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) OJ L 149, 5.7.1971, p. 2

(2) OJ L 74, 27.3.1972, p. 1.

(3) In its opinion, the Commission refers to Case C-278/91 and the party "Kuusjärvi". However, on the basis of the date of the judgement (11 June 1998), it is clear that the case actually being referred to is C-275/96 *Anne Kuusijärvi v Riksförsäkringsverket* [1998] ECR I-3419.

(4) Now replaced by Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p. 1.